IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21168

LOGAN LANES, INC., an Idaho Corporation,
Appellant,

vs.

BRUNSWICK CORPORATION, a Delaware Corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

REPLY BRIEF OF APPELLANT

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SUBJECT INDEX

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CASES CITED

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RULES OF COURT

Corrections in Citations in Brief of Appellant

Bruces Juices should be 91 L ed 1219.

Joseph E. Seagram should be 384 US 35, 16 L ed 2d 336.

Sunkist Growers should be 370 US 19.

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STATEMENT OF THE CASE

The third, fourth and last sentences in the last paragraph on page 2 of Brief of Appellee contain controverted facts (Exhibits 1 through 6, R 55-64), and should not be assumed or used on this appeal. There is also nothing to indicate the Utah State Building Board can or does purchase "supplies" for schools.

Utah seems to have judicially held that in contemplation of law the Board is a body corporate, a legal entity; and it is capable of suing, of being sued, taking and holding property, and contracting in its own name and existing independent of the individuals who compose it. Great American Indemnity, p. 4 Brief of Appellee. Although appellant contends the question of "immunity" as correctly applied is not before the court, it would appear that Utah might likely have waived such immunity as concerns the activities of the Board in its purchases.

> And see discussion: *Lauritzen* v. *Chesapeake Bridge and Tunnel District,* (D.C. E.Va. 10/20/66) 35 LW 2263.

ARGUMENT

Appellee has noted an oversight in Brief of Appellant. We consider this and note further corrections. Appellant overlooked citing on page 61 immediately under *Standard Oil* the cause of:

> *United States* v. *Trans-Missouri Freight Association,* (1896) 166 US 290 322-329, 41 L ed 1007, 1021-1023,

to compare this cause and *Standard Oil* with *Noerr Motor Freight* (incorrectly spelled as Moller Freight).

Immediately above the *Singer Mfg.* citation on page 28 and the *Union Carbide* citation on page 44, the cases:

> *Continental Ore Co.* v. *Union Carbide and Carbon Corporation,* (1962) 370 US 690, 702-709, 82 S Ct 1404. 8 L ed 2d 777, 786-790;

United States v. *Sisal Sales Corp.*, (1927) 274 US 268, 47 S Ct 592, 71 L ed 1042,

each should have been cited.

We now reply to the brief of appellee by use of its heading references:

The Statutory Basis for the Cause of Action

The Utah State Building Board is in the status of a buyer or representative of a buyer. It would appear in addition to 2(a) that Section 2(c) of Robinson-Patman might also be applicable to Brunswick in "granting" a "discount" or an "allowance" or "other compensation". The application of (c) does not depend upon a showing that any part of the allowance accrued to the benefit of the buyer and knowledge of such allowance by the buyer is immaterial.

Fitch v. *Kentucky-Tennessee Light and Power Co.*, (1943) 136 F 2d 12;

Baysoy v. *Jessop Steel Co.*, (1950) 90 F Supp 303;

Rangen, Inc. v. *Sterling Nelson*, 351 F 2d 851;

on 2(d) application: *Flothill* v. *F.T.C.*, 358 F 2d 224.

Appellee's Argument II A, B and C

Appellee confuses *sovereign immunity* with the *sovereign exemption doctrine*. The former is a substantive rule said to be based on jurisdiction precluding liability of a sovereign without its consent.

Larson v. *Domestic and Foreign Commerce Corp.*, (1948) 337 US 682, 93 L ed 1628.

The former applies when a state engages in governmental functions as contrasted to those matters in which it engages in a proprietory capacity; it applies *whether or not a statute is being construed or invoked;* it continues only from its vestigial antecedent of jurisdictional failure allowing the sovereign to immunize itself and its governmental officials from suit activity. Although "where a state's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere . . . subject to the constitutional power of the federal government, the question whether the state's act constitutes the alleged consent is one of federal law." *Pardin* v. *Terminal R. Co.,* 377 US 184, cited in *Lauritzen* v. *Chesapeake Bridge,* 35 LW 2264.

Appellant contends that the sovereign exemption doctrine is properly applied only as a protection of the enacting sovereign and only as a rule of construction when interpreting the application of a statute, and the exemption is based on the premise that the very sovereign enacting the legislation is presumed to intend the enactment not to be harmfully applied to itself.

Immunity is not involved in the present case because this suit is not to compel or restrain action by the state sovereign. Exemption is not involved as the United States Government enacting the Clayton and Robinson-Patman Acts does not seek to avoid one of its general statutes otherwise imposing a restriction on its remedial rights; in fact, such enacting sovereign was not a participant in any way in the discriminating activity and such activity was not for its benefit; and the enacting sovereign was affected by the discriminatory activity only in the sense that Congress

found that such practice was harmful to the common welfare of the citizenry and intended by such legislation to condemn such discriminatory sales as made by Brunswick. Correctly analyzed the *only* questions are whether Congress has the power, under those delegated to it by the Constitution, to enact such legislation to include sales to a state; and, if so, does the legislation enacted interdict sales of goods to states at a discriminatorily low price when such goods are used in competition with another buyer. Congress, as amply illustrated in our brief (pp. 29-31) had the power to enact this legislation and did *fully* exercise its commerce clause power. Since such full power does constitutionally embrace state competitive activities the act plainly applies.

Appellee in its Brief on page 7 and top of page 8 cites case authority and on pages 14 through 18 administrative interpretation none of which relate the sovereign exemption doctrine as protecting state action against federal enactments. *Hoar* plainly holds state law must give way to federal and each of the others relate the doctrine to the enacting sovereign. Appellee then cites on page 8 six other decisions which appellee asserts hold the federal antitrust laws do not *apply* to state action.

The confusion of appellee in distinguishing between jurisdictional *immunity* with overtones of regulatory power and the *exemption* rule of statutory construction is dramatically compounded by its failure to correctly define the very exemption doctrine itself.

Hoar, on its facts and from the language used, stands for the principle that a general *statute imposing remedial*

restrictions or prohibitions does not impose such on the government without clearly so indicating. There is no statute of such nature, federal or state, in this case. It is correctly used only when construing a law which limits and confines remedial rights and privileges. The doctrine is correctly applied to the remedies of a sovereign in the interest of the public benefit and of preserving public rights, revenues and property so that such defenses as limitations, anti injunction, and those rights the negligence and oversight of which public officials can affect, while generally available, cannot be raised to the sovereign action unless the sovereign so intends. The cases cited by appellee carry the doctrine no further, leaving for consideration the other "six" cases.

It might be here inserted that *Lowenstein* and *Olson* v. *Smith*, were each decided prior to enactment of the Clayton Act and specifically the addition in 1914 of the definitions in 15 USC 12. The very fact Congress enacted the Clayton Act (1914) and then the Robinson-Patman Act (1936), after numerous courts had held certain activity not invalid of the common law, federal or state enactments, grounded an inference that Congress intended to change the law and enlarge the remedies.

Standard Fashion Co. v. *Magrane Houston Co.*, (Mass 1919) 259 Fed 793, affm'd 258 US 346, 66 L ed 653;

Nashville Milk Co. v. *Carnation Co.*, 355 US 373, 2 L ed 2d 340.

Note should also be made of the clear congressional intent that no exemption apply to state action unless Con-

gress grant such explicitly as illustrated not only by the 15 USC 13 c and the cooperative exemptions and 2(b) of the McCarran-Ferguson Act allowing state regulation of the insurance industry, but also the Miller-Tydings Act and the McGuire Act amending Sec. 1 of the Sherman Act specifically to recognize the validity of state activity in the defined area otherwise disallowable on the federal pre-emption.

In *Lowenstein,* South Carolina specifically authorized in itself a monopoly. In doing so it was the sole violator alleged and as such a *necessary party* to any action as no private individual or corporation at all was involved in the complained of activities. The entire opinion is premised on immunity by the simple logic that the state being most necessary as the only party and enjoying its immunity as sovereign no action would lie as the jurisdiction fails. Contrast this cause to that case decided two years later arising out of the same lower court:

> *Scott* v. *Donald,* (1897) 165 US 58, 17 S Ct 59, 41 L ed 632;
>
> and also: *Ex Parte Young,* (1900) 209 US 123, 52 L ed 714.

In the problem of federal and state conflict the present United States District Court in South Carolina, in *Ayers* v. *Pastime Amusement Co.,* (10-4-66) 35 LW 2193, cites this ninth circuit in *Twentieth Century Fox Corp.* v. *Winchester Drive-In Theatre,* 351 F 2d 925:

> " 'State law cannot be permitted to impede the effectuation of the national objectives expressed in the statutory schemes of the antitrust laws. We affirm the

lower court's determination that a federal rule should apply.' The principles of federal, and not state, law must govern the issues here since the causes of action arise and are predicated upon federal anti-trust statutes."

The Brief of Appellant has considered, *General Shale* (pp. 40-41), *Sachs* (p. 42), and *Parker* (pp. 46-49). Appellant submits the latter is concerned with whether and to what extent Congress intended to restrict state legislative regulatory schemes and *Lowenstein, Olson* v. *Smith* and *Parker* are grounded in immunity and affected by commerce power preemption rather than in the rule of construction claimed by appellee.

Certainly, federal courts have jurisdiction over treble damage antitrust actions even though state regulation is prominent.

Board of Governors v. *Transamerica Corp.*, (9 Cir 1950) 184 F 2d 311;

Nippert v. *Richmond*, 327 US 416, 66 S Ct 590, 90 L ed 760;

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 US 384, 95 L Ed 1035, 71 S Ct 745;

Northern Securities Co. v. *United States*, 193 US 197, 332, 334, 347, 48 L ed 679, 698, 703, 704, 24 S Ct 436;

Maryland & Virginia Milk Producers Assoc. v. *United States*, 362 US 458, 80 S Ct 847, 4 L ed 2d 880 (1960);

United States v. *Intl. Boxing Club of New York*, 348 US 236, 75 S Ct 259;

United States v. *Mfgrs. Hanover Trust Co.*, (D.C. N.Y. 1965) 240 F Supp 867;

Las Vegas Merchant Plumbers v. *United States*, (9 Cir 1954) 210 F 2d 732.

Appellee in its brief states that the exemption applies to "the sovereign" or "a sovereign" and seems to mean any sovereign, and appellee summarizes the exemption applies to any transaction in which a sovereign is a party (note brief of appellee page 8, last paragraph; page 13, top paragraph). If by this is meant that the sovereign exemption doctrine "insulates" a transaction involving a sovereign, or that dealing with a sovereign in its exercise of a governmental function excludes private culprits then most certainly has our Supreme Court rejected the premise asserted by appellee.

Continental Ore Co. v. *Union Carbide*, (1962) 370 US 706, 82 S Ct 1404, 8 L ed 2d 777;

United States v. *Sisal Sales Corp.*, 274 US 268, 71 L ed 1042;

and to Robinson-Patman, see: *Baysoy* v. *Jessop*, 90 F Supp 313.

Appellee urges *E. W. Wiggins Airways, Inc.*, v. *Massachusetts Port Authority* as sustaining its position. First, of most dramatic moment, is the obvious fact that the First Circuit in the cause cited does not in turn rely on or cite as sustaining authority any of the five (p. 7 top p. 8) cases or interpreting paper cited by Appellee dealing with the sovereign exemption doctrine. If this opinion was based, as appellee contends on the sovereign exemption doctrine, why did not the First Circuit by name rely on this doctrine

at some place in the opinion? The answer to this (and that five of those other "six" decisions are not mentioned in *Wiggins*) can be determined from noting: (1) that these cases do not hold the anti-trust laws do not "apply" to state action, and (2) the two premises on which the First Circuit opinion was actually based. These premises were: The Massachusetts Port Authority was engaged in a governmental function and relied upon governmental *immunity*. It was immune to private suit without its consent. The First Circuit took certain language from *Parker* v. *Brown* seeming to conclude that the immunity of a state itself was recognized by Congress so that the intent of Congress was not to impose liability on the state or its governmental agencies in performance of governmental functions. Second, and most relevant to this cause, the First Circuit held the non-governmental agencies, that is private parties, were not there responsibile for the clear reason that on the merits these private parties did not violate any antitrust law. The court did not reach the question whether Butler-Boston or Butler would have been amenable if they had actually conspired, that is through their private action violated the anti-trust laws as the complaint failed to allege any such private action as part of a proscribed conspiracy. In our case, quite the contrary, Brunswick was the active discriminator and its private action caused the damage to the appellant. No conspiracy or collusion is required under Robinson-Patman.

While appellant suggests that subsequent decisions in analogous situations do indicate an extension of intended coverage of the antitrust laws precluding state regulatory

schemes the fact remains *Parker* gives appellee little comfort as we are not now dealing with jurisdiction or state regulatory activity.

Parker was concerned with the singular inquiry whether a state statute was rendered invalid. Action was brought against the state officers administering the prorate Act not for damages but to restrain the officers from enforcing the state act. The Supreme Court held there was no illegal interference with interstate commerce without citing authority for, naming or relying on a sovereign *exemption* doctrine. The case as presented was a classic "immunity" situation later so carefully categorized and compartmentalized in:

> *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 US 682, 93 L ed 1628.

The hard question was whether the federal Congress in the exercise of its commerce power intended in the federal acts, including the Sherman Act, *to suspend a state law.* In the language quoted by appellee the court refused to nullify a state statute by restraining state officers from their official duties.

> "Immunity from the antitrust laws is not lightly implied . . . We could not assume that Congress, having granted only a limited exemption . . . nonetheless granted an overall inclusive one . . . 'When there are two acts upon the same subject, the rule is to give effect to both if possible.' "
>
> *California* v. *Federal Power Comm.*, 369 US 482, 8 L ed 2d 54.

In the suit now before this court there is no attempt to suspend a state law as no Utah law conflicts with the

federal act, and for the same reason no restraint of state officers is involved.

Appellee misplaces the meaning under *Larson, Parker* and similar cases of the judicial significance to " 'restrain' state action" replacing these with its words " 'applied to' state action". The federal anti-trust laws apply to state action. A completely different question is presented when determining if Congress intended to force on the states an immunity loss by allowing private parties to sue the state in the Federal Courts in restraint of state action. Thus, by following *Northern Securities* and *Union Pacific* (Appellant Brief p. 46) Justice Stone first noting that while the Sherman Act did not so allow suits *against states* in restraint of state action then in the language quoted in Brief of Appellant noted that neither did Congress authorize each state to in effect consider, adopt or destroy parts of the federal law by extending immunity beyond itself and its agents to "those" other "persons" falling in violation of the federal acts.

Of all doctrines for accommodation of regulatory statutes to the anti-trust laws, *pro tanto* exemption from the anti-trust laws by implication is to be sharply avoided.

> *Carnation Co.* v. *Pacific Westbound Conference,* 383 US 213, 15 L ed 2d 709 (reversing 9th Cir., 336 F 2d 650).

Resort to exemption from or repeal of an anti-trust law is to be avoided unless there is a "plain repugnancy" between the statutes with a most "unequivocally declared" Congressional purpose for inapplication of the anti-trust laws.

United States v. *Borden Co.*, 308 US 188, 197-206, 84 L ed 181;

United States v. *Philadelphia National Bank*, (1963) 374 US 321, 350-355, 10 L ed 2d 915, 937-947.

From this we find the enacting sovereign intends to have the anti-trust statutes considered in the broadest possible application even when in conflict with its own more recent enactments. Justice Story in *Hoar* was really applying without citing principles of *McCulloch* v. *Maryland*, 4 Wheat. 316, 4 L ed 579, decided two years earlier when he stated:

> "It is not to be presumed, that a state legislature mean to transcend their constitutional powers; and, therefore, however general the words may be, they are always restrained to persons and things, over which the jurisdiction of a state may be rightfully exerted. And if a construction could ever be justified, which should include the United States, at the same time, that it excluded the state, it is not to be presumed, that congress could intend to sanction an usurpation of power by a state to regulate and control the rights of the United States."

In *McCulloch*, Justice Marshall made a telling point as to the present case:

> "In America, the powers of sovereignty are divided between the government Union and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

As stated in our former brief and referred to in *Lauritzen* there is substantial doubt whether Utah has the power

to conflict in any way with the application of the federal antitrust laws—an object committed to the Union. However, Utah has not attempted to avoid application of such laws in its transactions with private parties. It would appear manifest that the legislature of Utah did not direct or authorize a violation of the federal price discrimination statutes, and it only authorized the bids and purchases to be made consistent with federal and state laws. Appellee is "afforded no defense" from the fact the Board "in carrying out the bare act of purchasing" was acting "in a manner permitted" by Utah law. "There is nothing to indicate that such law in any way compelled discriminatory purchasing." *Continental Ore Co.*, 370 US 690, 707, 81 L ed 2d 777, 788. Appellee cites *F.T.C.* v. *Sun Oil*, wherein the Supreme Court, after searching for congressional intent concluded while the generating cause for the Robinson-Patman Act may have been reaction to predatory use of mass purchasing power by chain stores neither the scope nor the intent of the act was limited to such suitation or set of circumstances. Congress through this act sought generally to obviate price discrimination practices threatening independent businessmen from whatever source and with the intent to assure within reasonable practicability that each business man had equal competitive footings so far as price was concerned. 371 US 505, 520, 9 L ed 2d 466, 479

Appellee's Argument V and III

The Brief of Appellee presents an argument V which generally challenges the position of appellant that the trial court erred in considering the motion to dismiss as a motion for summary judgment. Attention is called to the col-

loquy in the Transcript of Record Vol. II which is the recorder's transcript of the proceedings, May 20, 1966. It will be observed that the court chose to emphasize the only matter that day before the court and submitted for decision was on the motion to dismiss and not for summary judgment. (V. II, pp. 5-8, 18) Throughout the proceeding counsel for plaintiff made it clear that on the public use of the bowling facilities a factual question was presented in which further discovery was necessary. The Admissions and Interrogatory answers, while germane to a motion for summary judgment, would not be considered on motion to dismiss, and the court (pp. 2-8) made it clear that the reason for halting discovery was to test whether the allegations of the amended complaint stated a claim. In summary, the court stated he saw no reason not to grant an extension of time before allowing discovery stating to Plaintiff: "I don't know how you could be prejudiced". Counsel answered: "That is correct as to the motion to dismiss, there can't be. We have a complaint and motion to dismiss. The only time that it is relevant, the inference is, would be on the so-called motion for summary judgment which was raised in the brief. If there is a factual dispute, we would want to explore through factual determination, the school being open to the public and doing business. That is on the summary judgment and not the motion to dismiss."

"The Court: The Motion to dismiss is a Motion to Dismiss.

Mr. Johnson: On that, and the complaint, we are prepared to argue." (R. 7, pp. 5-18)

Appellant respectfully submits that the court was hearing the motion to dismiss as such and not as a motion for summary judgment, and appellant plainly made it known that if fact issues were presented then the plaintiff would want to explore this through discovery although its discovery efforts were so abortively halted in this same hearing. Appellee should have the burden to establish that plaintiff did not need discovery in order to meet the motion for summary judgment since defendant so moved after interrogatories had been served by plaintiff.

Skouras Theatres Co. v. *Radio-Keith-Orpheum Corp.*, 1966 Trade Cases 71, 729 (S.D. N.Y.).

Appellee's Argument IV

Appellant submits the procedural errors are based on much more than mere failure to comply with local rule 7. If Appellee means to suggest in the first sentence at the top of page 25 in its brief that the applicable local rule became "effective" on the date of the order, this is clearly misleading. Rule 7 as worded in the record became effective "from and after December 1, 1961" as an amendment to the rules adopted January 1, 1948, and as amended was applicable to this action. In a later 1966 amendment Rule 7 was modified in Rule 4 with the applicable language retained. However, as appellant stated in its Brief the more important offense was ignoring the spirit and letter of Rule 33 and Rule 36, F.R.C.P., and earlier Order of the District Court. Appellee, as defendant below, did not serve objections to the interrogatories as required by rule. Appellee did not deny or object to the requested admissions. The defendant could not have submitted points and authorities because the authority on manner to proceed, object, answer

or deny if not clear in the earlier court order is contained in the rules themselves, which the appellee did not follow but chose to disregard.

The objection is not hypertechnical, but, by avoiding the prescribed procedure and thus thwarting appellant's preliminary discovery and in the same instant inserting by affidavits a version of facts on competitive use of the goods it sold, the appellee in essence attempts to preclude appellant from developing the full facts in discovery through additional interrogatories or depositions. Appellant did attack the accuracy of statements in appellee's affidavits. Appellant should not be denied the right to cross-examine appellee's affiants. Appellant remains precluded from determination as to the relevancy of specific interrogatories to aid in its further discovery.

Appellee in last paragraph page 22 of its Brief seems to agree that for 13 c to apply the supplies must not be used competitively and argues a *resale* is necessary rather than merely competitive *use*. Appellant submits on the plain wording of Robinson-Patman and cases earlier cited this is error.

See also: Clairol, Inc., Trade Reg. Rep 17, 295 (F.T.C. Dkt 8647, 1965).

Respectfully submitted,

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I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules. I further certify that I mailed three copies of the above Reply Brief of Appellant by depositing three copies thereof, on the 28th day of November, 1966, with sufficient postage on the envelope in a United States Government mail receptacle addressed to the following:

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.....

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